STATE OF MICHIGAN

COURT OF APPEALS

CHEBOYGAN COUNTY ROAD COMMISSION,

Plaintiff-Appellant,

v

HUGH E. SMYTH and LINDA M. SMYTH,

Defendants/Third-Party Plaintiffs-Appellees,

and

DAVID KUJAWA, NANETTE J. KUJAWA, MICHAEL A. KAVANAUGH, and ANNETTE S. KAVANAUGH,

Third-Party Defendants/Third-Party Plaintiffs/Counter-Defendants-Appellees,

and

LAWYERS TITLE INSURANCE CORPORATION,

Third-Party Defendant-Appellee,

and

THEODORE C. WUERFEL and MARGARET B. WUERFEL,

Third-Party Defendants,

and

WILLIAM JACKSON and CAROL SULLIVAN,

UNPUBLISHED
May 29, 2003

No. 236827
Cheboygan Circuit Court
LC No. 97-006309-CH

Third-Party Defendants/Third-Party Plaintiffs/Counter-Plaintiffs/ Counter-Defendants-Appellees,

and

LEWIS W. MCLOUTH and SHIRLEY A. MCLOUTH,

Third-Party Defendants/Counter-Plaintiffs-Appellees,

and

WILLIAM CONN and JEFFREY LYON,

Third-Party Defendants-Appellees.

Before: Smolenski, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting it an easement for a county road over a portion of defendants' property. The trial court held that although plaintiff established an easement either under the highway by user statute or by common-law dedication, the easement was less than sixty-six feet wide and did not extend to the shore of Burt Lake. We affirm in part, reverse in part, and remand for further findings.

Plaintiff argues that the trial court erred in its finding that the roadway did not extend to the shore of Burt Lake, either under the highway by user statute or by common-law dedication. We review de novo the legal requirements for establishing a highway by user by common-law dedication, and we review the trial court's factual findings for clear error. *Kalkaska Co Rd Comm v Nolan*, 249 Mich App 399, 401; 643 NW2d 276 (2001); *Christiansen v Gerrish Twp*, 239 Mich App 380, 384, 387; 608 NW2d 83 (2000). A finding is clearly erroneous if the reviewing court is left with the definite and firm conviction that a mistake has been made. *Cimock v Conklin*, 233 Mich App 79, 84; 592 NW2d 401 (1998).

The highway by user statute, MCL 221.20, provides:

> All highways regularly established in pursuance of existing laws, all roads that shall have been used as such for ten [10] years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used eight [8] years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this

> act. All highways that are or that may become such by time and use, shall be four [4] rods[1] in width, and where they are situated on section or quarter section lines, such lines shall be the center of such roads, and the land belonging to such roads shall be two [2] rods in width on each side of such lines.

Establishing a public highway under this statute "requires (1) a defined line, (2) that the road was used and worked on by public authorities, (3) public travel and use for ten consecutive years without interruption, and (4) open, notorious, and exclusive public use." *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 554-555; 600 NW2d 698 (1999), citing *Bain v Fry*, 352 Mich 299, 305; 89 NW2d 485 (1958). The burden of proof rests with the governmental agency claiming a highway by user. *Cimock, supra* at 87, n 2.

The trial court held that plaintiff had established the existence of a roadway but found that it only extended to within thirty feet of the lakeshore. Having reviewed the record, we conclude that this finding was not clearly erroneous. The only evidence that the public used the entire length of Hardwood Road to access the lake involved seasonal snowmobile use, and even this use was infrequent because there was an easier access route across the neighboring property.

Even assuming this scant evidence was sufficient to satisfy the public use element, however, plaintiff was also required to prove that it had maintained the area, which requires more than infrequent, minor maintenance. *Keller v Locke*, 62 Mich App 591, 592-93; 233 NW2d 666 (1973). In this case, there was simply no evidence of maintenance of the portion of the road nearest the lakefront. Indeed, plaintiff's maintenance foreman testified that the road was maintained only to within approximately thirty feet of the lakeshore to avoid exacerbating erosion problems. Accordingly, the trial court correctly limited the roadway to within thirty feet of the lakeshore.

Plaintiff also argues that the trial court erred in failing to apply the presumption of width contained in the highway by user statute, and erroneously placed the burden of establishing the width on plaintiff rather than defendants in accordance with *Eyde Bros Dev Co v Eaton Co Drain Comm'r*, 427 Mich 271, 298; 398 NW2d 297 (1986). The trial court declined to grant a sixty-six-foot wide easement because to do so would encroach two feet on defendants' deck, which was preceded by a cement slab which had existed on that property "for several decades preceding" defendants' acquisition of the property.

Under the statute, "a dedication is established during the ten-year period of limitation. It is during that ten-year period that a property owner can present evidence that rebuts the existence and extent of a public highway." *City of Kentwood v Sommerdyke Estate*, 458 Mich 642, 654; 581 NW2d 670 (1998). In this case, the trial court made no specific finding with respect to when the statutory period began running, nor did its findings of fact include any indication when defendants' encroaching structure was installed. Because we are unable to resolve these crucial

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[1] Four rods equal sixty-six feet. *City of Kentwood v Sommerdyke Estate*, 458 Mich 642, 666; 581 NW2d 670 (1998).

issues based on the evidence in the record, we remand this issue for further factual findings to determine whether defendants can successfully rebut the statutory presumption of width.

Affirmed in part, and reversed and remanded in part. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Michael R. Smolenski
/s/ Richard Allen Griffin
/s/ Peter D. O'Connell